No. 4660

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

CHUN NGIT NGAN,

Plaintiff-in-Error,

vs.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, A NEW JERSEY CORPORATION,

Defendant-in-Error.

BRIEF ON BEHALF OF DEFENDANT-IN-ERROR

Upon Writ of Error to the Supreme Court of the Territory of Hawaii.

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By....., Deputy Clerk.

INDEX

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STATEMENT OF FACTS.

The brief of the plaintiff-in-error states in considerable detail and with substantial fullness the facts and the issue presented upon this writ of error. The facts are few and entirely free from dispute. A policy of life insurance containing a clause that it should be incontestable after one year from its date except for non-

payment of premium, was issued to one Yuen Tai Kam in favor of Chun Ngit Ngan, his wife, the plaintiff-in-error. Nine months later the insured died of tuberculosis. Thereafter and within a period of one year from the date of the issuance of the policy the defendant-in-error herein (hereinafter referred to as the insurer) made a tender to the beneficiary, plaintiff-in-error herein, of the amount of the first premium, the only amount which had been paid by the insured to the insurer, at the same time notifying beneficiary that the insured had made in his application for the policy certain false and fraudulent representations concerning his health; that upon the ground of such fraudulent misrepresentation made to obtain the issuance of the policy it considered the policy invalidated and refused to be bound by it or to pay upon it and demanded of the beneficiary a return of the policy.

Upon the trial the insurer introduced evidence to prove the false and fraudulent representations which had been made by the insured in his application for the policy upon which misrepresentations the insurer relied in issuing the policy. The beneficiary introduced no evidence and made no effort to resist the contention of the insured that fraud had been practiced by the insured and that such fraud would constitute a complete defense to the action. The beneficiary elected to stand squarely upon the clause relating to incontestability and insisted and still insists that it is wholly immaterial whether or not insured was guilty of fraud. Upon the trial, jury-

waived, the presiding judge filed a written opinion holding that the insured had made in his application for the policy false and fraudulent representations concerning his health and that such false representations were material and induced the granting of the policy and that but for the clause relating to incontestability the insurer would have a complete defense to the action. Judgment was entered for the beneficiary on the ground that the insurer had not not effectively contested the policy within a period of one year.

The judgment was reversed by the Supreme Court of the Territory which held that the acts of the insurer within the period of one year did constitute a contest within the meaning of the insurance contract and that, therefore, the material fraudulent misrepresentations of insured constituted a defense to the action.

The cause was remanded for retrial and a second judgment was entered, in accordance with the decision of the Supreme Court, in favor of the insurer. The second judgment was rendered without a second trial, the parties hereto, however, stipulating the additional evidence that Yuen Tai Kam, the insured, died intestate without issue, his father, Jim Jan, and his widow, the beneficiary and plaintiff-in-error herein, surviving him, said father and widow being residents of the Territory of Hawaii; that on April 11, 1923, a petition for the appointment of an administrator of the estate of said Yuen Tai Kam was filed in the Circuit Court of the First Circuit of the Territory and that thereafter on May 29, 1923, admin-

istrators of the said estate were duly appointed and qualified as such. (R. pp. 173, 174.)

The judgment was affirmed by the Supreme Court upon the reasoning contained in the former opinion. The beneficiary is now before this court as plaintiff-in-error seeking to reverse the second judgment entered in the trial court and affirmed by the Supreme Court of the Territory of Hawaii.

ARGUMENT

I. THE ISSUE.

It is undisputed that the insurer herein took within a period of one year all of the steps to renounce liability, rescind the contract and put the parties in statu quo which were possible outside of a court proceeding. The issue before this court is thus narrowed to this proposition:

Under a life insurance policy containing a clause relating to incontestability is it possible for an insurer who has a valid ground for contest and rescission on account of the fraud of the insured, to so contest the policy within the one year period, outside of court, as to afford an effective defense to an action on the policy instituted after the expiration of one year?

The beneficiary contends that to constitute a contest some court proceeding was necessary and that the acts of the insurer herein did not constitute a contest within the meaning of the policy. The insurer contends that its acts did constitute a contest and that the fraud of the

insured, therefore, operates as an effective defense to the claim of the beneficiary.

This statement of the issue is substantially in accord with the statement of the issue contained on page 11 of the brief of the beneficiary-plaintiff-in-error.

II. THE FALSE AND FRAUDULENT STATEMENTS MADE BY INSURED TO INSURER'S EXAMINING PHYSICIAN INVALIDATED THE POLICY.

The uncontradicted evidence in this case shows that the insured practiced a fraud on the insurer and that if the insured had truthfully stated to the examining physician his physical condition and the history of his visits to and treatment by physicians during the three-year period preceding the issuance of the policy that defendant would not have issued the policy.

It is unquestionably the law that such fraud invalidated the policy and affords a complete defense to the insurer.

In holding that false statements to insurer's physician as to physical condition and as to treatment by physicians previous to the time of examination invalidate a policy and that the trial court should have directed a verdict for insurer, the Supreme Court of the United States said in a recent case:

> "Material representations in an application for life insurance which are incorrect, if known to be untrue by the assured when made, and nothing else appearing, invalidate the policy issued by the insurer

> relying on such representations, without further proof of actual conscious design to defraud." *Mutual Life Ins. Co.* vs. *Hilton-Green,* 241 U. S. 613 at page 622.

In holding on similar facts that a verdict should have been directed for insurer the Circuit Court of Appeals of the Eighth Circuit said in the recent case of *Mutual Life Ins. Co.* vs. *Hurni Packing Co.*, 260 Fed. 641 at page 646:

> "The answer having been untrue, and the matter material, and the maker of the statement necessarily knowing that it was untrue when he made it, the intention to deceive the insurer is necessarily implied as the natural consequence of such act."

A petition for a writ of certiorari in the above case was denied in 251 U. S. 556.

To the same effect are numerous decisions of which the following are a few:

> *Moulor* vs. *Am. Life Ins. Co.,* 111 U. S. 335, 345.
> *Phoenix Life Ins. Co.* vs. *Radein,* 120 U. S. 183, 189.
> *Aetna Life Ins. Co.* vs. *Moore,* 231 U. S. 543, 556-557.
> *Metropolitan Life Ins. Co.* vs. *McTague*, 49 N. J. Law 587, 9 At. 766.
> May on Insurance, 4th ed., Sec. 181.

It is therefore perfectly clear that unless precluded by the incontestability clause, the insurer herein has, on the facts and the law, a perfect defense and that the decision of the Supreme Court of Hawaii should be affirmed.

III. ANY PRESUMPTION AGAINST THE INSURER AS TO THE MEANING OF THE TERM "INCONTESTABLE" IS UNWARRANTED BECAUSE OF THE FACT THAT THE PROVISION IS REQUIRED BY STATUTE.

The brief of the beneficiary, plaintiff-in-error, emphasizes a general rule that ambiguous clauses of insurance policies must be construed against the insurer and in favor of the insured. It is provided by a Hawaiian statute, as is set forth on pages 12 and 13 of the opposing brief, that a life insurance policy must contain a provision that it shall be incontestable not later than two years from its date except for non-payment of premium.

It is contended by the beneficiary that because the insurer provided in the policy herein that said policy should be incontestable not later than one year from its date, that therefore the insurer went further than the statutory requirement and thus made the clause a purely contractual one subject to the usual construction of such contracts. This argument, however, is obviously fallacious because the reduction by the insurer of the period of contestability from two years as required by the statute to one year as provided by this policy throws no light whatever upon the question of what was meant by the use of the term "contestable," which is the whole point at issue in this case.

In support of the proposition that "contracts of insurance are construed against the insurer and in favor of the insured and this has not been changed by the adop-

tion of a standard form of insurance policy" stated on pages 17 and 18 of her brief, the plaintiff-in-error cites six cases.

The first three are from the State of North Carolina and show upon examination no explanation or reasoning whatever in support of the extraordinary proposition. The fourth and fifth cases cited, *Chichester* v. *New Hampshire Fire Ins. Co.,* 74 Conn. 510, 51 Atl. 525, and *Wood* v. *American Fire Ins. Co.,* 149 N. Y. 382, 44 N. E. 80, have no bearing upon and in no way support the proposition. The sixth case, *Leisen* v. *St. Paul F. & M. Ins. Co.,* 127 N. W. (Md.) 837, is eliminated because the State of North Dakota had a statute as shown on page 844 of the decision providing: "Policies of insurance in the form prescribed by the last section shall be in all respects subject to the same rules of construction as to their effect or the waiver of any of their provisions as if the form thereof had not been prescribed."

Furthermore the statement is made on page 18 of the opposing brief that "the New York cases are especially significant inasmuch as the standard form of policy of Hawaii has been adopted from New York." Upon page 19 of her brief the plaintiff-in-error concludes, "Thus, under the rule that the adoption of a statute carries with it the judicial construction of its effect the Hawaiian legislature enacted, with the standard policy the rule that the language thereof was still to be construed in all cases of ambiguity favorably to the insured."

There is nothing whatever in the record to show that

the Hawaiian statute was adopted from New York or from any other state. There is before this court only the words of the statute themselves and the fact, as shown by the footnote at the end of the section in question, 3464, Revised Laws of Hawaii, 1925, that the provision under consideration was a part of Chapter 115 of the Session Laws of Hawaii of 1917. The Session Laws of Hawaii, 1917, show that said Act 115 was approved and became effective as law on April 21, 1917.

The cases are numerous to the effect that the rule that policies of insurance should be liberally construed in favor of insured because prepared by the insurer, has no application where the contract is in the form prescribed by statute.

Rosenthal v. *Insurance Co. of N. A.*, 158 Wis. 550, 149 N. W. 155, Ann. Cas. 1916 E. 395.

Temple v. *Niagara F. Ins. Co.*, 109 Wis. 372, 85 N. W. 361.

Del Guidici v. *Importers' Etc. Ins. Co.* (N. J.), 120 A. 5.

Mick v. *Royal Exch. Assur. Corp.*, 87 N. J. L. 607, 91 A. 102.

Nelson v. *Traders' Ins. Co.*, 74 N. E. 421.

Hewins v. *London Ass. Corp.*, 184 Mass. 177, 68 N. E. 62.

The provision in the policy herein that it should be incontestable after one year from its date is, as to the incontestable feature, in compliance with the statutory mandate. The rule of construction of policies against the insurer because the policy is drafted by the insurer can have no application to the case at bar. The policy

follows the words of the statutory requirement. The reason for the rule vanishes.

The issue herein depends for solution therefore upon the intent of the Legislature of Hawaii when in April, 1917, by approval of the governor, the incontestable clause requirement became part of the insurance law of Hawaii. It is true that a number of cases have held that the term "incontestable" used in insurance policies means court action. But the attention of this court is most earnestly called to the fact that not a single case is cited by the plaintiff-in-error on this point which was decided prior to April, 1917. There was in April, 1917, no judicial construction by any court of the meaning of the term "contestable" when the Legislature of Hawaii directed that the provision should appear in all life insurance policies.

It is submitted that in this case there can be presumption against the insurer in determining the meaning of the clause relating to a contest.

IV. THE STEPS TAKEN BY THE INSURER HEREIN CONSTITUTED A CONTEST WITHIN THE MEANING OF THE POLICY AND RENDERS THE FRAUD OF INSURED A COMPLETE DEFENSE TO THIS ACTION, NOTWITHSTANDING THE INCONTESTABLE CLAUSE OF THE POLICY.

There is no question in this case as to the fact that the insurer took within a period of one year all of the

steps to renounce liability, rescind the contract and put the parties in statu quo which were possible outside of court. It did everything within its power to contest the policy during the year except to go to court. Furthermore as will be pointed out and developed later, there was from the date of discovery of fraud—after the death of insured and nine months after the policy was issued—to the expiration of the one year period no administrator of deceased. An administrator would have been a necessary party to a court proceeding for cancellation because the administrator was entitled to return of the premium upon court cancellation. Thus a court proceeding by the insurer was impossible during the one year period. This point will be presented later in this brief.

The decisions cited and quoted from under the first heading of this brief establish beyond question that fraud of insured is a defense and "*invalidates the policy,*" to quote again from the Supreme Court of the United States in *Mutual Life Ins. Co.* v. *Hilton-Green,* 241 U. S. 613, supra. There can be no question but that the provision of the policy that it is incontestable *after* one year, leaves the situation as to the rights of the parties unaffected in every way *during the period of one year.* This point is obvious.

What is the meaning of the term "incontestable after one year" as used in this policy? What was the legislative intent in the requirement of a provision that the policy should be incontestable after a prescribed maximum period? A contest was still allowed within the

prescribed period. What was it intended that the "contest" should include?

The beneficiary contends that the intention was that during the term of one year nothing that either the insurer or the insured could do, outside of court, to rescind the contract should have any effect whatsoever, notwithstanding the most glaring fraud perpetrated by the insured, and this startling conclusion is drawn merely because the policy complying with the statute prescribes that it shall be "incontestable." In other words, that once the policy was issued, the insurer was helpless to rescind or create a defense by any possible action it could take during the one year period reserved for investigation, regardless of the most patent fraud, other than by an expensive court proceeding for cancellation and rescission. The fraud might be discovered within a day after the policy was issued in reliance upon the false and fraudulent representations of insured whose affirmative duty it was to disclose the truth, but nevertheless the insurer must go to the expense of a suit in equity or all else that it may do avails it nothing.

The obvious intention was to make certain to the insured that, after he has paid his second premium, his beneficiary will be cared for, and to impose on the insurer the correlative obligation, after receipt of the second premium, to pay the beneficiary at all events or under all circumstances provided that the insurer has not during the period of one year contested liability, tendered back premiums and demanded return of policy. In other

words the purpose was to assure the insured that after a year has passed without the insurer having done anything to indicate that in the event of the death of the insured it would not pay the face of the policy, provided premiums are regularly paid, he can rest assured that his beneficiary will receive the face of the policy. The insurer has one year in which to make such investigation as it sees fit and rescind the policy if fraud in the application is discovered. But if the insured remains quiescent and does nothing within the one year to intimate or indicate that it will not pay the policy, that is, to contest it, then the insured knows positively that the policy will be paid.

But to contend that it was the intention of the contracting parties or of the legislature that even during the one year period the insurer was helpless to cancel the policy or to create in its favor any defense, other than by going into court in an action to cancel the policy, is to do violence to every reasonable construction of the words of the policy. If the tendering back of the premium which has been paid, the demanding of the return of the policy and the notification that the insurer did not regard itself bound by the policy on account of the fraud practiced by the insured, was not a contest, then what possible term can we apply to the action that was taken by the insurer in this case? Such action must in the nature of things have had some effect and there must be some method of describing the insurer's attitude coupled with its acts. And what word can better describe

what occurred than the term "contest"? We repeat, if the insurer's acts were not a contest then how shall we describe their attitude and action?

The term "contest" is defined in 7 Am. & Eng. Encyclopedia of Law at page 78 as follows:

> "CONTEST.—The primary meaning of the verb "to contest" is to make a subject of dispute, contention, or litigation; to call in question, to controvert, to oppose, to dispute. It is further defined as meaning, to defend as a suit or other judicial proceeding; to dispute or resist, as a claim, by course of law; to litigate."

In certain situations, the term "contest" has a definite technical meaning; for example, contest of a will or contest of an election. But those are specialized uses of the terms established through long usage. There is in the law technically no such thing as the contest of an insurance policy. Whenever the insurer tenders back premiums, demands a return of the policy and notifies insured or beneficiary that it no longer considers itself bound by the policy on account of fraud, it makes a form of contest. The bringing of an equity suit for cancellation is merely another form of contest. By the incontestability clause the insurer engages that after a period of one year from the date of the policy has passed without its having denied liability on the policy, tendered back premiums and demanded surrender of the policy, thereafter the assured may rest confident that the insurer will make no defense against a claim under the policy. This clause is a time limitation on the right of the

insurer that would otherwise exist to defend the policy at any time, on account of fraud practiced by the insured. That is to say, the fraud would in all cases and without limitation be a perfect defense but for the said clause. The limitation on the right to defend against fraud should not be so construed as to inflict a greater limitation on the rights of the insurer to defend itself against a fraud than clearly arises from the plain wording and meaning of the clause itself. And there is nothing whatever in the clause or in the general law to show or even indicate that the term contest as used in the policy means court action.

Our contention as to the intention of the parties is shown further by other words in the incontestable clause. It is provided that the policy is "incontestable after one year except for non-payment of premium." This means, of course, that it is contestable both before and after a year in the event of non-payment of premium. If by the term "contest" is meant court action *alone*, then an insurer has no defense either before or after a year even in the event of non-payment of premiums unless it goes into equity to cancel the policy. Of course that is absurd. But that is the inevitable corollary of the contention that nothing but court action constitutes a contest. After one year it is contestable in one event only—non-payment of premium. Contestable by an equity suit to cancel the policy if the insured does not pay the premium? That must be so if the parties meant by "contest," court action.

The general principles, as shown by scores of cases by

which insurance contracts and clauses therein are to be construed are summarized in Corpus Juris under the general title of "Insurance" as follows:

> "(Par. 259) 3. *Intention and Ascertainment Thereof—a. In General.* A policy or contract of insurance is to be construed so as to ascertain and carry out the intention of the parties, as it appears from the language of the whole instrument, viewed in the light of the surrounding circumstances, the object or purpose of the contract, its subject matter, the matters naturally or usually incident thereto, the risk insured against, the situation of the parties, the business in which they are engaged at the time, their relation to each other, and the general undertaking of the company toward its policyholders. The intention of the parties is primarily to be sought in the language of the instrument, and, if possible, it is to be ascertained from the words of the contract alone." 32 Corpus Juris, 1148-1150.
>
> "(Par. 261) 4. *Meaning of Languages; Punctuation.* The words employed in a contract of insurance are to be taken and understood in their plain, ordinary, usual, and popular sense, rather than according to the meaning given them by lexicographers or persons skilled in the niceties of language, unless it appears from the four corners of the instrument that both parties intended they should be understood in a different sense, or unless it appears that, by a generally established usage of trade or business in respect to the subject matter, the words have acquired a peculiar sense." 32 Corpus Juris, 1150-1151.
>
> "(Par. 262) 5. *Reasonable Interpretation.* Contracts of insurance should be given a fair, reasonable, and sensible construction, such as, it is to be assumed, intelligent business men would give it, rather than a strained, forced, unnatural, unreason-

> able, or strict, technical interpretation, or one which would lead to an absurd conclusion, or render the policy nonsensical." 32 Corpus Juris, 1151-1152.

There are many cases involving in one way or another this incontestable clause. But a large number of them are wholly inapplicable to the case at bar for the reason that in them no steps whatever were taken by the insurer to dispute liability or to rescind the policy or to make a contest during the specified period of time—one, two or three years. Such cases have, of course, no bearing on the present issue. And the cases holding that by contest the parties meant court action, are without exception decided without any adequate or satisfactory discussion of the problem involved or explanation of the grounds of the decision. And, finally, so far as appears, there was no statutory requirement that the clause be included in the policy.

Neither the argument on behalf of the beneficiary nor cases cited and relied upon analyze or explain why or by what reasoning the term "contest" means an action in court. Neither the fair inference to be derived from the use of the phrase nor fairness to the insured requires such a conclusion. It is far-fetched indeed to contend that because the phrase is part of the policy, as is compelled by our statute, it is inserted therein for the benefit of the insurer and must therefore be construed against the insurer and most favorably to the insured. If ever a provision of a policy can be for the benefit of the insured and against the interests of the insurer, this provision affords a striking illustration.

If the insurer, *without right,* endeavors to contest the policy by return of premiums, etc., during the first year and during the lifetime of insured, the insured has two choices. He can refuse to consent to such cancellation, continue to make a proper tender of premiums as they fall due, and upon his death, his beneficiary can recover on the policy. American Trust Co. v. Life Ins. Co., 92 S. E. 706. Or he can bring a suit in equity to have the policy declared in force and thereafter there can be no question of recovery upon the policy after his death.

If the insured dies within a year and a contest, *without merit* therein, is made by insurer thereafter, but before the end of one year, the beneficiary can enforce the policy in an ordinary action at law.

There can therefore be no hardship on either insured or beneficiary by the construction which we place upon the phrase. Unless insurer completes its investigation and discovers the fraud and contests the policy during the year by denying liability and tendering back the premiums, the matter is forever at rest and the insured can thereafter rest assured that nothing is required to assure his beneficiary of collection upon the policy upon his death except regular payment of premiums. If the contest by insurer is made without right, the insured if alive can continue to make his tender of premiums, and his beneficiary can recover upon the policy upon the death of insured, or he can have the policy declared valid by a court of equity. It is no more expensive to prosecute such a suit than it is to defend a suit brought to

cancel and rescind the policy. If he dies within the year, the rights of his beneficiary are unaffected by the contest which was made without merit.

On the other hand it is utterly unreasonable to construe the incontestable clause—in all respects so favorable to the insured and beneficiary—as meaning that the parties intended the insurer must go to the expense of a lawsuit to rid itself of liability when a plain and unmistakeable fraud by insured was perpetrated upon it.

The one case which reasons this whole matter out on principle is *Mutual Life Ins. Co. of New York* vs. *Rose, et ux,* 294 Fed. 122, decided in 1923. Large portions of this opinion could be appropriately quoted herein because of the clearness of the reasoning and the unanswerableness of the logic that by the term "contest" is not meant court action alone.

In this case there was a two-year incontestable clause, The insurer discovered that the insured had practiced a fraud upon it as to his health in the application for two life insurance policies and within the contestable period and on the ground of such fraud, tendered to the defendants the premium which had theretofore been paid, demanded the surrender of the policies to it, which they refused, and thereby it was claimed that the policies became and were rescinded.

After the period of contestability had passed, insurer brought a suit in equity to cancel the policies. Defendant moved to dismiss the bill on the principal ground that the insurer had not contested the policy during the con-

testable period. The contention was that nothing but court action could constitute a contest.

The Court discusses and analyses all of the cases on the subject, shows that upon the discovery of the fraud within the contestable period, the insurer may terminate the policy by tender back of the premium, demand of return of policy and notification of rescission; that thereby rescission *in pais* is effected by insurer's acts out of court; that a contest by court proceedings within the contestable period is unnecessary. The Court overruled the motion to dismiss.

We quote the following from the conclusion of this splendidly reasoned out case:

> "With this contact with fundamental notions, so finely stated, we are in position to deal with the question in hand from the point of view of principle. That question is whether, if a policy of insurance has been rescinded for fraud in the way thus pointed out, during the period of contestability, may not such rescission be relied on as a ground of a suit in equity to cancel the policy, brought after the expiration of such period, or may it be pleaded as a defense to a suit brought on the policy after the expiration of such a period? It seems to me that it is hardly necessary to do more than state this question than to come to the conclusion that the incontestability clause is not in the way of the bringing of such a suit or the making of such a defense. The question answers itself. There is nothing in such clause that is in the way of a policy in such a case being rescinded; i. e., brought to a termination in such a way. That clause has nothing to do with what may or may not be done during that period. It only deals with what may not be

done after the lapse of that period. Can it be possible that such clause, which does not inhibit such a termination of the policy of insurance during such period, does inhibit its being availed of after the lapse of such period? Such a position, i. e., as to the termination of the policy by rescission, taken in a suit to cancel, or in an answer to an action to recover on the policy—cannot really be said to be a contest as to the policy; i. e., as to its validity. It is merely a claim that it has come to an end and that, even though such claim is based on the voidability of the policy, entitling the insurer to bring it to an end.

"What is sought is not an avoidance of the policy. *It has already been avoided during the contestable period, and what is relied on is that it has already been so avoided.* If, by virtue of any provision in the policy, it should come to an end, even after the lapse of the contestable period, it can hardly be contended that the incontestability clause is in the way of relying on such termination. Or, if it has come to an end during the contestable period, by rescission for fraud, and the insured has accepted the premiums tendered back, it certainly would not be claimed that, after the lapse of such period, suit might not be brought to cancel it, or an action on the policy might not be defended against on this ground. *But such acceptance is not essential to a termination of the policy. It comes to an end by the mere tender of the premiums in the name of rescission and demand of a return of the policy.* What the clause has to do with is the voidability or avoidance of the policy after the expiration of the contestable period. It has nothing to do with whether the policy has come to an end, during such period, even though such termination may be based on the voidability of the policy, and such termination can be relied on aggressively or defensively after the expiration of the period.

"This conclusion is not against, but in line with, the purpose intended to be served by the incontestability clause. It is to prevent the postponement of litigation as to the validity of the policy, not only until after the death of the insured, but until after the lapse of a short period after the execution of the policy. In other words, it is to enable the insured to have a hand in such litigation, and that shortly after such execution. In case the insurer takes steps to rescind the policy on the ground of fraud, such as will bring about its rescission within the contestable period, the insured does not have to wait until the insurer brings suit to cancel the policy based upon such rescission. He can at once take steps to bring the matter to a head by initiating litigation himself. If the insurer is in the wrong—i. e., if the policy was not in fact obtained by fraud—such attempt at rescission is, as said in the American Trust Co. case, 'a breach by renunciation' of the contract of insurance. In such a case the insured does not have to wait until the policy becomes payable by its terms before bringing suit. He can bring suit at once. He has two remedies. They are thus stated in Day v. Conn. General Life Ins. Co., 45 Conn. 480, 29 Am. Rep. 693:

> "'Thus it would seem that a person situated as the plaintiff was may choose between two remedies: (1) He may elect to consider the policy at an end; in which case, with a declaration containing proper averments, he may recover the equitable and just value of the policy . . . Of course such a case should depend upon the question whether the policy was rightly declared forfeited. If it was, the plaintiff cannot recover; if it was not, he will recover the full value of the policy. (2) If he desires that the policy shall continue, he may institute a proceeding to have it adjudged to be in force, in which case the question of forfeiture may be determined. In that

> case the rights of the parties will be determined in a reasonable time, the parties will be relieved of suspense, and if it is decided against the forfeiture both parties will have what they originally contracted for.'
>
> "To the same effect is 14 R. C. L. p. 1014. I must conclude, therefore, that the incontestability clause in the policies involved herein is not in the way of the plaintiff being entitled to the relief he seeks." (Italics ours.) *Mutual Life Ins. Co. of N. Y.* v. *Rose,* 294 Fed. 122, at pages 133-134."

The leading case, so far as force of authority goes, in support of our contention, is *Mutual Life Ins. Co. of N. Y.* v. *Hurni Packing Co.* There were three separate appellate court decisions on this case and it is reported in 260 Fed. 641, 280 Fed. 18, and 263 U. S. 167, 68 L. ed. 45, 44 Sup. Ct. Rep. 90.

In the first action, suit was brought by the Packing Company against the insurer on a life insurance policy. Insurer set up fraud as a defense, the fraud consisting in a statement made by the insured, in his application for the life insurance, that he had not consulted nor been treated by a physician during the previous five years, when in fact he had been treated or prescribed for each year for supposedly temporary ailments. A verdict was directed for plaintiff and from the judgment for plaintiff, insurer appealed. The Circuit Court of Appeals for the Eighth Circuit reversed the judgment holding that because of such fraud a verdict should have been directed for defendant insurer. A new trial was ordered. 260 Fed. 641.

Upon the second trial, after the case had been redocketed, and after a second trial, the plaintiff, by leave of court, amended its reply as follows:

> "The plaintiff states that the defendant failed to contest the policy of life insurance payable to the plaintiff, by the tender of the return of the premiums paid or otherwise within the two-year period in which the policy might be contested by the terms thereof, and it is now barred from setting up or urging any of the defenses set forth in its answer."

At the close of the evidence, both parties submitted motions for a directed verdict; that of the beneficiary was sustained, a verdict was directed accordingly, and judgment for the beneficiary resulted.

The evidence showed that the policy was dated August 23, 1915. It was executed September 7th and delivered September 13, 1915. The policy on its face contained the permission that "the applicant, upon request, may have policy antedated for a period not to exceed six months." The policy contained a provision that it should be "incontestable except for non-payment of premiums, provided two years shall have elapsed from its date of issue."

The insured died on July 4, 1917, less than two years from the time the policy was issued whether the effective date of issue was the date upon the policy as contended by the beneficiaries, or the date of execution and/or delivery as contended by the insurer. Proofs of death were duly submitted. Replying to the claim thereby made, on the 24th day of August, the attorney for the

insurer wrote to the attorney for the beneficiary that the company declined to pay the policy upon the ground of the misrepresentation hereinabove referred to. This was the first action of any nature taken by the company to avail itself of the defense reserved in the two-year clause above quoted.

The court held, first, that the repudiation of the claim of beneficiary such as was made in the letter on behalf of insurer dated August 24th was a sufficient act of contest, and that court proceedings were not essential to the assertion of the right, as counsel for the beneficiary contended. The court then held, in the second place, that although the contest was sufficient, the company did not act in time. That the two-year period began to run from the *date* of the policy—*August 23*—and not from the date of execution or the date of the delivery of the policy as contended by the insurer. That therefore the contest, although sufficient, made on *August 24th,* two years later, was one day too late.

There can be no doubt that the Circuit Court of Appeals decided squarely as the first point of its decision that the contest of the company evidenced by said letter was a sufficient act of contest. This was unmistakably the attitude of the court, as shown by the decision. To quote from page 20 (280 Fed. 20):

> "It is contended by the Insurance Company that the policy must have been in effect two years during the life of the insured; otherwise the right of the insurance company to contest became fixed by death within the period of limitation. We cannot

> agree with this view. The reservation for the benefit of the company was one that might be waived. Affirmative action was necessary to the consummation of the inchoate right created by the terms of the policy. We are equally of opinion that a repudiation of the claim of defendant in error, such as that made in the letter of August 24th, was a sufficient act of contest, and that court proceedings were not essential to the assertion of the right, as counsel for defendant in error contend.
>
> "*This being true, there remains only to consider whether the defendant company acted in time.* We do not think it did." (Italics ours.)

The insurance company appealed to the Supreme Court of the United States. That court held in affirmance of the Circuit Court of Appeals that although the contest was sufficient it was not made by the insurer in time as the two-year period began to run from the date shown on the face of the policy and not from the date of the execution and/or delivery of the policy.

There can be no doubt that the decision of the Supreme Court, just as the decision of the Circuit Court of Appeals, involves as the very first point of its decision that the contest was sufficient and that a court proceeding to contest the policy is not essential. This is shown, first, by the fact that counsel for insurer made this point as one of the main contentions of insurer. See 263 U. S. 167 at p. 172, under "Argument for Petitioner":

> "IV. Notice by the insurance company denying liability on the policy was a 'contest' and prevents the assertion of an estoppel under the incontestability clause."

Moreover, the court says (263 U. S. at page 174): "The first action taken by the insurance company *to avail itself of the misrepresentation of the insured* was on the 24th day of August, 1917, one day beyond the period of two years after the conventional date of the policy." (Italics ours.)

Although the Supreme Court did not expressly and in so many words, as did the Circuit Court of Appeals, say that the contest was sufficient, it so held as an unmistakable point of its decision. Unless the contest was sufficient, then it was immaterial whether or not it was made in time. It was useless for the Supreme Court of the United States to waste its valuable time deciding whether the two-year period commenced to run from the date of the policy or from the date of the execution and/or delivery unless something occurred during that period to afford insurer a defense—that is, to amount to a "contest" of the policy.

The attitude of the Supreme Court and the effect of its decision as being squarely in point in our favor is well stated by Judge Cochran in *Mutual Life Ins. Co. of N. Y.* v. *Rose,* 294 Fed. 122 at page 131, wherein it was decided, as shown above, that a court proceeding to contest a policy is unnecessary. Judge Cochran said in commenting upon the second decision of the Hurni case by the Circuit Court of Appeals, supra (280 Fed. 18):

> "It was taken for granted that such repudiation (letter of August 24th) was a sufficient contest of liability, and that the only question for decision was as to when the two years ran, from the date of the

policy or the date of its delivery. It was held that it ran from the date of the policy, and hence that the repudiation came too late, and the beneficiaries were entitled to recover. . . .

"Then as to the question as to whether the repudiation of liability on the policy was sufficient affirmative action to bring such inchoate right into effect, it was said:

> " 'We are equally of opinion that a repudiation of the claim of defendant in error, such as that made in the letter of August 24th, was a sufficient act of contest, and that court proceedings were not essential to the assertion of the right, as counsel for defendant-in-error contend.'

"Here the position just stated was not argued for. It was only argued from. In other words, it was the pre-supposition, the necessary pre-supposition, of the question that was actually considered and decided. Without it there was no such question in the case for consideration and decision. Hence it was that, as I say, though this position was not argued for, it was argued from. *And this, I take it, is sufficient to make the decision a direct authority here in favor of the plaintiff's position.*" (Italics ours.)

It is most earnestly submitted, therefore, that this decision by the Supreme Court of the United States made in 1923 is squarely in point on the issue before this court, and since it is in our favor, other or further citations of cases are unnecessary. We, however, refer the Court to the following recent state court decisions:

Markowitz v. *Metropolitan Life Ins. Co.*, 203 N. Y. Sup. (App. Div.) 534.

Mutual Life Ins. Co. of N. Y. v. *Stevens*, 195 N. W. (Minn.) 913.

Jefferson Standard Life Ins. Co. v. *Smith*, 248 S. W. (Ky.) 897.

V. THE NOTICE BY THE INSURER TO CHUN NGIT NGAN OF THE REPUDIATION OF THE POLICY, TENDER TO HER OF THE PREMIUM PAID AND DEMAND FOR RETURN OF THE POLICY WAS A RESCISSION OF SUCH POLICY AND THEREFORE A CONTEST THEREOF.

(A) As beneficiary of the policy Chun Ngit Ngan was the proper person to whom such notice and tender should be made to effectuate a rescission of the policy.

The rule and the reasons therefore are set forth in the *American Century Life Ins. Co.* v. *Rosenstein,* 92 N. E. 380 at page 383:

> "The law to which we have referred governing tender and the settled law in this state requiring insurance companies to return or offer to return the fruits of their contracts with the insured, if they would rescind them, being entirely consistent during the life time of the insured are not rendered inharmonious by the substitution of the beneficiary in place of the insured after the latter's death; for, as we have seen, the law governing this class of contracts creates the necessary privity on the part of the beneficiary, and thereafter the company and the beneficiary are the only parties in interest. The purpose of appellant in offering to return the premium was not that it should be applied upon the contract but to avoid it and if appellee alone could enforce payment of the contract, she alone could have accepted a return of the premium in bar of the action, a thing the personal representative of the insured or the widow could not do. It must be kept in mind that the policy in question was not void, but voidable at the election of the insurer and the rules applicable to a recovery of the premium in the one case are not applicable in the other."

This decision is followed in *Commercial Life Insurance Co.* v. *Schoyer,* 95 N. E. 1004, and in *Grand Lodge of B. of R. T.* v. *Clark,* 127 N. E. 280.

(B) Such notice and tender to Chun Ngit Ngan constituted a rescission as against the estate of the insured.

The evidence herein shows that Yuen Tai Kam, the insured, died intestate, without issue, leaving surviving him his father, Jim Jan, and his widow, Chun Ngit Ngan, plaintiff herein. Under the Hawaiian statute relating to the descent of property the father and widow take as tenants in common. Revised Laws of Hawaii, 1925, Sec. 3305. The policy was issued on May 1, 1922. Insured died on February 5, 1923.

The notice and tender was made to Chun Ngit Ngan on April 7, 1923. The evidence shows, by stipulation upon retrial, that upon such later date there was no executor or administrator of the estate of the deceased; that it was not until May 29, 1923, more than a year after the date of the policy, that an administrator of his estate was appointed. The evidence therefore shows that notice of repudiation and tender of premium was made to one of the two persons who as tenants in common of the estate of decedent were entitled to receive anything to which such estate might be entitled. Chun Ngit Ngan and Jim Jan were the legal representatives of deceased entitled to receive the whole of his estate and the only legal representatives of deceased and of his estate at the time of such notice and tender and indeed until nearly a month after the expiration of the one-year period. It is

clear that to effectuate a rescission and void the contract the defrauded party must make an earnest effort to restore the status quo. But this rule is based upon fairness and justice and *merely requires the innocent party to restore or offer to restore the status quo so far as is reasonably within his power to accomplish it.*

> "*321. Rule as to Restoration of Status Quo by Defrauded Party.*—As a general rule, where a party seeks to be relieved from a contract upon the ground that it was induced by fraud, he must, except so far as he has some legal excuse for failure, restore his adversary to the position he was in at the time of the contract, and there can be no rescission as long as he retains anything received under the contract, which he might have returned, and the withholding of which might be injurious to the other party. The reason upon which it rests is the injustice of permitting a man to retain a benefit under a contract which he on his part repudiates."
>
> 6 Ruling Case Law, Page 940.
>
> *Roberts* v. *James,* 83 N. J. L. 492, 85 Atl. 244 Ann. Cas. 1914 B. 859.
>
> *Bostwick* v. *Mutual Life Ins. Co.,* 92 N. W. 246 at page 253.

A bona fide payment to the sole distributee of a fund to which the estate of decedent is entitled, made before administration is granted, operates as a discharge of the party paying from liability to subsequently appointed administrators.

> *Vail* v. *Anderson,* 64 N. W. 47.
>
> *Johnson's Adm'r.* v. *Long Meyer,* 39 Ala. 143.
>
> *Hannah's Ex'r.* v. *Lankford's Adm'x.,* 43 Ala. 166.
>
> *Lewis* v. *Lyons,* 13 Ill. 116.

Walworth v. *Abel,* 52 Pa. St. 370.
Bogart v. *Furman,* 10 Paige 496.
Schouler on Wills, Executors and Administrators, 6th Edition, Vol. 4, Sec. 3563.

Likewise a tender to one co-tenant is a tender to both.

Gentry v. Gentry, 33 Tenn. (K. Sneed) 87, 60 Am. Dec. 137.
Briggs v. *Hall,* 5 Metc. (Mass.) 504.
Dyckman v. *New York,* 5 N. Y. 434.
Loddiges v. *Lister,* 1 L. T. Rep. N. S. 548.
38 Cyc. 157, Note.

It is submitted, therefore, that the admitted notice of repudiation of the contract and tender of the premium to Chun Ngit Ngan effectuated a rescission of the policy and that by such rescission the voidable policy was avoided, wiped out and destroyed so that there is nothing upon which to base an action. Such rescission was accomplished either because as beneficiary she was the proper party to whom notice should be given and tender made or because as tenant in common of estate of deceased she was the proper party, as one of the only two representatives of the estate of deceased, to receive return of the premium. The equitable requirements of restoration of status quo by the insurer to accomplish a rescission has been satisfied so far as was within the power of the insurer to accomplish it. That no executor or administrator of deceased had been appointed at the time of the tender or within a period of a year was attributable to no fault of the insurer.

VI. THE INSURER HEREIN CONTESTED THE POLICY SUED UPON BY JUDICIAL ACTION WITHIN THE PERIOD OF CONTESTABILITY ALLOWED BY THE POLICY.

The policy sued upon in this case is dated May 1, 1922. Insured died February 5, 1923. No administrator was appointed until May 19, 1923. This action was brought upon the policy June 27, 1923. The answer of the defendant was filed upon July 9, 1923, in which answer the insurer gave notice of its intention to rely upon fraud and misrepresentation by the insured in his application for insurance. The filing of this answer constituted a "contest" of the policy within all of the decisions relating to this point. While this answer was not filed within a period of one year from the date of the policy, it was filed within one year excluding the period from February 5, 1923, the date of death of insured, until May 29, 1923, the date of the appointment of an administrator herein.

Such period during which there was no administrator should be exempted from the time limitation of the incontestable clause. It would have been impossible for the insurer to have brought an action for cancellation of the policy during the one year period for the reason that the duly appointed administrator or executor of the estate of decedent would have been a necessary party to such an action. The bill for rescission and cancellation would have been fatally defective if the insured or his duly appointed legal representative had not been

joined with the beneficiary as a party to the proceeding. The court could not and would not decree cancellation unless there was before the court some person standing in place of deceased who was the other party to the contract sought to be cancelled.

Prior to the recent inclusion of the incontestability clause in policies, it was the settled law of the Federal Courts that after the death of insured a suit in equity would not lie for the surrender and cancellation of the policy upon the ground that it was obtained by fraud, for the reason that the courts held that the company had a plain, speedy and adequate remedy by interposing the fraud as a defense to an action at law upon the policy.

Insurance Co. v. *Bailey,* 13 Wall. 616.

Cable v. *U. S. Life Ins. Co.,* 191 U. S. 288.

Riggs v. *Union Life Ins. Co.,* 129 Fed. 207.

There seems to be only one case in which the question as to whether the period between the death of the insured and the appointment of an administrator should be deducted in computing the period of contestability is decided squarely. The Supreme Court of Illinois, which is the most vigorous of any jurisdiction in the country in strictly construing the contestable clause, held that where an insurance policy was payable to the estate of insured and was incontestable after one year from its issuance, the time between the death of the insured before the expiration of the incontestable period and the appointment of administrator must be deducted in computing

period of contestability, since the insurance company could not move for the appointment of an administrator and could not bring suit to contest the policy until an administrator was appointed. *Ramsay* v. *Old Colony Life Ins. Co.,* 131 N. E. 108.

The law contemplates that there should be one full year during which the company could bring suit against the insured or his personal representative for rescission or cancellation. In the case at bar the insurer upon a discovery of the fraud after the death of the insured did all that it was legally possible for it to do. It tendered to Chun Ngit Ngan who either as beneficiary under the policy or as one of the two tenants in common entitled to receive the estate of deceased, was entitled to receive the premium. There was in existence no court appointed legal representative of deceased from February 5, 1925, until May 29, 1923. There was no other person to whom a tender could have been made to accomplish a rescission *in pais.*

If there was a rescission of the contract then the contract was thereby destroyed and there was nothing upon which suit could be brought. If there was not a rescission, then it must be because there was no legal representative to whom a tender could be made. If there was no legal representative to whom a tender could be made to effectuate a rescission then there was no person who could have been joined with the beneficiary as a party defendant in an action to cancel the policy. Unless therefore, it be held either that there was a rescission of

the contract because of the tender or that the period during which there was no court appointed legal representative of deceased must be excluded from computation of the period, the insurer herein was absolutely deprived of any possibility of defense during the last three months of the one year period of contestability. It was within the power of the beneficiary to delay the appointment of an administrator until after the one year period had passed and thereby deprive the insurer of its perfect defense on the ground of fraud.

It is submitted that the decision in the Ramsay case from the Supreme Court of Illinois quoted above is precisely in point to the effect that this period should be excluded in computation of the one year period. If such period be excluded the insurer herein made a judicial contest by the filing of its answer setting up the fraud within a period of one year.

The plaintiff-in-error cites *N. W. Mutual Life Ins. Co.* v. *Pickering,* 293 Fed. 496, as being opposed to our contention on this point. Examination of the case, however, shows that it is not even in its dicta in opposition to our contention. There the insured died within three months after a reinstatement of the policy. There was no administrator between the third and fifth months. But during the last seven months of the one year period there was an administrator who could have been sued and during all that time the insurer was aware of the fraud. The court said on page 498:

"The part of the plea which was stricken does not disclose the case of an insured being deprived by the action or nonaction of beneficiaries under the policy of a reasonable opportunity to contest within a year from the date of the reinstatement. On the contrary, it is disclosed that during the period of more than seven months prior to the expiration of one year from the date of the reinstatement there was no obstacle to prevent the institution of a contest, and that the ground for contest relied on was discovered during that period. That being so, the lack of administration on the insured's estate for a short time prior to the insurer's discovery of a ground of contest was without influence on the conduct of the insurer, and cannot excuse the insurer's failure to contest within the time allowed.

"A different question would have been presented if those who would have been benefited by the payment of the insurance money had been responsible for a postponement of the appointment of a personal representative of the deceased insured until shortly before or after the expiration of a year from the date of the reinstatement of the policy, with the result of depriving the insurer of a reasonable opportunity for contesting within the time allowed."

VII. GREAT WEIGHT SHOULD BE GIVEN TO THE DECISION OF THE SUPREME COURT OF HAWAII.

The question herein involves an interpretation of the meaning of a phrase required by a Hawaiian statute enacted before any judicial construction had been placed upon the phrase. The Hawaiian Supreme Court has in the decision herein interpreted that phrase to mean that the acts of the insurer constituted a contest. We have

here a clear instance of a local territorial statute. It is well settled that under such circumstances an appellate court must lean toward the interpretation adopted by the Supreme Court of the Territory, and will not disturb its decision unless there is clear error.

Cardona v. *Quinones,* 240 U. S. 83, 36 Sup. Ct. 346, 60 L. Ed. 538;

Lewers & Cooke v. *Atcherly,* 222 U. S. 285, 34 Sup. Ct. 94, 56 L. Ed. 202;

Kealoha v. *Castle,* 210 U. S. 149, 28 Sup. Ct. 684, 52 L. Ed. 998;

Ewa Plantation Co. v. *Wilder,* 289 Fed. 664;

Kinney v. *Oahu Sugar Co.,* 255 Fed. 732, 167 C. C. A. 78;

Castle v. *Castle* (C. C. A.), 281 Fed. 609;

Territory of Hawaii v. *Hutchinson Sugar P. Co.* (C. C. A.), 272 Fed. 856;

In Re Bishop's Estate, 250 Fed. 154, 162 C. C. A. 281.

CONCLUSION

In conclusion it is respectfully submitted that the judgment of the Supreme Court of the Territory of Hawaii should be affirmed. The insured was guilty, admittedly, of the most glaring fraud which invalidated the policy.

The Hawaiian statute of 1917 required the incontestable clause involved herein and hence no presumption against the insurer is warranted in the interpretation of the meaning of the clause.

The steps taken by the insurer within the contestable period constituted a contest within the meaning of the Hawaiian statute and of the parties.

The steps taken by the insurer within the contestable period, in view of the fact that the beneficiary was a tenant in common with the father in the estate of the intestate insured, constituted a rescission of the policy and therefore a contest thereof.

The filing by the insurer of his answer in this action within a period of one year from the date of the policy, deducting the period when there was no administrator of deceased insured, was unmistakably a contest of the policy and as such a complete defense of this action.

The question presented upon this writ of error is a purely local one involving merely the interpretation of a Hawaiian statute. All of the cases relied upon by the plaintiff-in-error were decided subsequent to 1917, the date of the enactment of the Hawaiian statute requiring this contestable clause, and hence throw no light upon the legislative intent in the requirement of this provision. Great weight should be given to the decision of the Supreme Court of Hawaii primarily charged with the interpretation of a Hawaiian statute,

Respectfully submitted,

FREAR, PROSSER, ANDERSON & MARX.
Walter F. Frear
Mason F. Prosser
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Dated at Honolulu, T. H., October 27, 1925.